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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 610

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, Petitioner

v.

ELINOR M. RATAY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, The Lincoln National Life Insurance Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered May 16, 1967, reversing a judgment in favor of petitioner against Elinor M. Ratay, the respondent, and remanding the case to the District Court with a direction that a new trial be ordered.

OPINION BELOW

The opinion of the Court of Appeals is reported at 378 F.2d 209. The District Court on December 9, 1965 entered judgment, without opinion, in favor of the defendant on special findings by a jury. The plaintiff's motion for a new trial was refused by the District Court by its order, also entered without opinion, dated April 14, 1966 and relying upon Jury Findings Nos. 8, 9(a) and 9(b). The opinion of the Court of Appeals, the order of the District Court for judgment, the order of the District Court refusing a new trial, and the jury's Special Findings Nos. 8, 9(a) and 9(b) are set forth in the Appendix hereto (page 26 et seq.).

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals, entered on May 16, 1967, is reproduced in the Appendix (page 36). The Court of Appeals denied the petitioner's petition for rehearing on June 15, 1967. That order is also reproduced in the Appendix (page 37).

QUESTIONS PRESENTED

1. In a diversity case for the proceeds of a life insurance policy applied for but never issued, where the District Court entered judgment for the defendant based on special findings of a jury establishing the defense of fraud in the application, and subsequently refused to grant a new trial, does the award of a new trial by the Court of Appeals, on the ground of an instruction, not objected to, about the kind of evidence necessary to sustain the defendant's burden of proof of the fraud defense, violate restrictions on review imposed by decisions of this Court and emasculate the requirement in Rule 51 of the Federal Rules of Civil Procedure that objections to the charge must be specific and made before the jury retires?

2. Does the award of a new trial by the Court of Appeals in such a case conflict with decisions of other Courts of Appeals and unfairly deprive the defendant of an opportunity to brief and argue its contention that the instruction was not erroneous and that the result reached by the District Court was not a miscarriage of justice?

3. Does the award by the Court of Appeals of a new trial in such a case violate the prohibition in the Seventh Amendment to the Constitution of the United States that no court of the United States shall re-examine facts tried by a jury except according to the rules of the common law?

FEDERAL RULE OF CIVIL PROCEDURE AND CONSTITUTIONAL PROVISION INVOLVED.

1. Rule 51 of the Federal Rules of Civil Procedure provides in material portion:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . ."

2. The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Jurisdiction in the federal courts is based upon the diverse citizenship of the parties. The action was for $50,320, the amount of life insurance applied for by an applicant who gave his note with the application in an amount substantially equal to the initial premium on the policy applied for, in exchange for a receipt which expressed conditions upon which coverage was to be provided pending issuance of the policy applied for. No policy was ever issued and the applicant died before the application was declined. The plaintiff, respondent here, is the applicant's widow and the proposed beneficiary. Of the three defenses interposed, the one here material is fraudulent misrepresentations in the application, in reliance upon which the defendant, petitioner here, was induced to refrain from declining the application during the applicant's lifetime.

The case was tried to a jury for more than a week and submitted to it on special interrogatories, and the District Judge entered judgment in favor of the petitioner on special findings of fraud in the application. The respondent appealed to the Court of Appeals alleging numerous errors in the District Court, but at no time either in the District Court or in the Court of Appeals did respondent complain of that portion of the charge which the Court of Appeals held to be erroneous and to justify a new trial. The first time the erroneous instruction was discussed in the case was in the opinion of the Court of Appeals dated May 16, 1967. In fact the respondent did not even bother to print the charge of the District Court until requested to do so by

the Court of Appeals. Your petitioner filed a petition for rehearing in the Court of Appeals which was denied on June 15, 1967, in spite of the fact that your petitioner had had no opportunity to submit a written brief or make an oral argument on the determinative issue. The charge correctly defined the elements of the fraud defense and correctly placed the burden of proof upon the defendant, but expressed the burden as being by the fair preponderance of the credible evidence, instead of by evidence that was clear, precise and indubitable.

The facts establishing fraud were proved by evidence that was documentary and not only uncontradicted and unexplained, but in large part stipulated by plaintiff's counsel to be authenticated and admissible.

On July 15, 1963, the respondent's deceased husband, Frank J. Ratay, consulted Dr. Edward J. Carnegie, his family physician practicing in Whitehall near Pittsburgh, Pennsylvania, complaining of chest pain on exertion (Ex. I, 13b).* Dr. Carnegie made an examination that included taking an electrocardiogram. The doctor prescribed Miltrate (Ex. N,17b), a vasodilator, and later Peritrate (Exs. K and L, 17b), another vasodilator. The applicant continued taking Peritrate until

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*Reference to portions of the record reproduced in the appendices filed in the Court of Appeals are by page number followed by the letter "a" if to the appellant's appendix, "a supp." if to the appellant's supplemental appendix, and the letter "b" if to the appellee's appendix. References to the exhibits admitted into evidence are by the appropriate letter or number preceded by "Ex." and followed by a reference to the page of the appendix, if any, where it is reproduced.

his death (Tr. 120).* All three of the medical witnesses who were called to the stand at the trial testified that the electrocardiogram showed abnormalities indicative of coronary arteriosclerosis. (Tr. 334, 345, 387).

On August 14, 1963 Ratay delivered to W. L. Lynch, a soliciting agent for your petitioner, Part One of an application to the company for insurance on his life (Ex. 1, 22a). This provided that no insurance would be considered in force until a policy was issued during the good health of the proposed insured, except in accordance with the terms of a receipt which was given by Agent Lynch acknowledging receipt of a note in the amount of $118.93. Both the receipt (Ex. 3, 27a, 28a) and the note (Ex. 2, 24a) are dated August 14, 1963, and the receipt provided that, if the insured was an acceptable risk at standard rates under the Company's rules, limits and standards, and in good health, the insurance would be effective when the application was complete and the first premium paid. Otherwise, the payment would be returned on demand and the receipt would be conditional.

Frank J. Ratay delivered Part Two of the application (Ex. 4, 29a) to Dr. F. E. Gray, a medical examiner for the Company, on August 28, 1963, in which he stated that he last consulted Dr. Edward Carnegie for an ache in the right knee in July, 1963. He denied ever having heart disease or chest pain, he denied ever hav-

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*References to a portion of the transcript of testimony not reproduced in an appendix are by "Tr." followed by the number of the appropriate page in the typed transcript in the original record.

ing an electrocardiogram, and he denied having consulted any physician in the past five years for any causes other than bursitis in 1962 and an ache in the right knee in 1963.

These statements by the applicant were false. The applicant had had heart disease, chest pains and an electrocardiogram, and had consulted Dr. Edward Carnegie in July, 1963, for a cause other than an ache in the right knee, namely for chest pain on exertion. The falsity of the answers was proved by Dr. Carnegie's office records (Ex. I, 13b). The answers of the applicant to these questions were made by him with knowledge of their falsity or otherwise in bad faith for the purpose of inducing the Company to give consideration to and approve his application for insurance and to issue to him the policy applied for (Special Finding 8, 47a). The matters inquired into in said questions were material to the risk (28a supp.), and had the questions been answered truthfully, the application, even on a rated up basis, would have been declined prior to the applicant's death (Special Findings 9a and 9b, 47a).

The heart condition from which Ratay suffered was of such a nature that, in the absence of truthful answers to the application questions, it was not likely to be detected by the usual medical examination made in connection with an application for insurance (Tr. 319, 320).

The defendant's underwriting rules and practices required that inquiries be made of Dr. Carnegie (Tr. 210, 211). Accordingly, the defendant wrote to Dr. Carnegie on September 5, 1963, asking him for a summary of his findings regarding the applicant (Tr. 197).

Dr. Carnegie did not reply until September 28, 1963. His reply (Ex. B, 6b) stated that Ratay had come to him in July, 1963, complaining of pain in the left anterior chest and shoulder, connected with activity and exertion, and that an electrocardiogram was taken at that time. Had Ratay's application answers admitted the taking of the July electrocardiogram, the September 5, 1963, inquiry to Dr. Carnegie would have requested him to forward the tracing for review (Tr. 218).

The information in Dr. Carnegie's report about the episode of chest pain suffered by Ratay in July, 1963, according to your petitioner's written underwriting rules (Ex. C, 7b), as it was suggestive of possible coronary insufficiency, required, at a minimum, that the applicant be rated up 100 percent, that is, the premium be double the standard rate, and then only if a current electrocardiogram should be normal (Tr. 219-20, 315-7). A decision to this effect was embodied in a letter dated October 2, 1963, (Ex. D, 9b), and the information imparted to Ratay and the plaintiff (Tr. 151, 418). If the July electrocardiogram had been included with Dr. Carnegie's reply, it would have been read as abnormal and the underwriting rules would have required a declination of the application (Tr. 336).

On October 7, 1963, Ratay had a second electrocardiogram (Ex. F) taken at Dr. Carnegie's office. This was mailed to the Company on October 14 and read by Dr. John W. Barch on October 15, 1963 and found to be abnormal (Ex. A, 39a). Ratay died on October 16, 1963, by myocardial infarction due to coronary arteriosclerosis of four to six months duration (Ex. 6). On October 23, 1963, without knowledge at the defend-

ant's home office of Ratay's death, the application was formally declined. Plaintiff's counsel acknowledged that he had not made out a case of negligent delay in the handling of the application (Tr. 452).

The jury found (46a, 47a) that Ratay was not in good health on August 14, 1963 (Special Finding No. 7), that on September 30, 1963, the Company decided not to issue a policy to Frank J. Ratay for life insurance at the rate of premium paid on the application, and on October 2, 1963, confirmed this decision by letter by J. R. Fagan to W. L. Lynch (Special Finding 3), that the electrocardiogram taken on October 7, 1963, was abnormal (Special Finding 6), that Ratay made false statements, knowing them to be false, or otherwise acted in bad faith in making them, when he answered questions 10, 12(c) and 12(h) of Part Two of the application (Special Finding 8), that the Company failed on September 5, 1963, to send for the electrocardiogram of July 15, 1963, by reason of relying on Ratay's answer to question 12(h) of Part Two of the application, and that if the electrocardiogram of July 15, 1963, had been forwarded, the Company would have declined Ratay's application on September 30, 1963 (Special Findings 9a, 9b).

At the conclusion of the District Court's charge counsel for the respondent asked for a general exception to the charge, to which request the Court made no response (39a supp.) and then counsel took specific exceptions in a number of particulars, none of which had to do with the kind, quality or character of proof required of the defendant to carry its burden on the fraud defense. Then the Court inquired whether coun-

sel had anything else to say, and in reply respondent's counsel stated: "Anything else would only tend to confuse the jury" (40a supp.). Respondent's fourth point for charge (43a) requested that the jury be instructed that the burden of proof on the fraud defense is on the Company. The charge as given was at least as favorable to the respondent as the requested instruction, as evidenced by the fact that counsel for petitioner in his main brief in the Court of Appeals acknowledged that the trial court correctly stated in the charge that the defendant had the burden of proof of fraud. Respondent's motion for a new trial in the District Court listed twelve separate grounds. None of them concerned the kind, quality or character of evidence required for the Company to sustain its burden of proof on the fraud defense. The Court of Appeals reversed on the basis of an unobjected to error in the charge without giving your petitioner an opportunity to brief or argue the issue. The alleged error, if it existed at all, was at most harmless, was not obvious or plain and did not cause a gross miscarriage of justice.

REASONS FOR GRANTING THE WRIT

1. The Action of the Court of Appeals in Granting a New Trial on Account of a Supposed Erroneous Instruction to the Jury That Was Not Objected to Before the Jury Retired or Assigned As Error Goes Far Beyond the Limits Set in United States v. Atkinson, 297 U.S. 157, and Presents an Important Question in the Administration of Justice in the Federal Courts.

In *Atkinson* this court stated (297 U.S. at 160): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

The case at bar is not a criminal case. There are no exceptional circumstances. The public interest is not involved and the alleged error is not obvious and does not affect at all the fairness, integrity or public reputation of judicial proceedings. Only if the judgment of the trial court, which was entered on the basis of the jury findings, was so improper as to be characterized as a gross miscarriage of justice, would the public interest or the fairness, integrity or public reputation of judicial proceedings be brought into question. In fact, the contrary is true in the case at bar. The findings of the jury on the issue of fraud were dictated by the overwhelming evidence adduced at the trial. The opinion of the Court of Appeals says nothing to the contrary. If the courts of appeals stretch the principle enunciated in *Atkinson* to the extent that the court

below has in the case at bar, the public interest in the finality of judgments entered on jury verdicts will be adversely affected and trial courts' consideration of new trial motions will no longer be accorded their time-honored finality as to factual review. Indiscriminate review by appellate courts of supposed errors in a charge which were noticed for the first time on appeal will undermine the conclusiveness of and confidence in jury verdicts.

Due economy of judicial manpower, and the time and effort of citizens who leave their regular pursuits to serve as jurors, to say nothing of the sacrifice of time and trouble by citizens who testify, and the expense, loss of time and risk undergone by litigants, requires that finality be given to a judgment entered on the verdict of a jury, where there is no suggestion that the result reached was not just and equitable. For an appellate court to be too free in granting a new trial on account of an unobjected to error in the charge, which was not even urged in the motion for a new trial or on appeal, encourages the losing party to prosecute an appeal, even where he knows of no error committed at the trial, just in the hope that the appellate court will notice some error which it can use as an excuse for ordering a new trial.

Not only does the award of a new trial by an appellate court in such a case entail great waste, as above pointed out, but it also works a grave injustice, since it enables a litigant, against whom an inadvertent error in the charge was committed, to gamble on the verdict in a case that he cannot lose. He could keep a verdict returned in his favor, because the error favored his

adversary, and get a new trial on account of the error if the verdict is adverse. The other party, conversely, is placed in the predicament of losing a favorable verdict because of unobjected to error and being unable to challenge an unfavorable verdict.

This unfairness becomes even more apparent when, as in the case at bar, the party requests the court to charge in such a way as to invite the error in question. In the instant case, the plaintiff's fourth point for charge (43a) requested that:

> "In order to establish the defense of false answers in the application for the purpose of defeating recovery on the policy, the burden is on the insurance company to prove that the applicant gave false answers on the application regarding his past medical history, which were material to the risk, knowing the same to be false and presumptively fraudulent and on which answers the insurance company relied in issuing the policy."

It is to be noted that this request undertakes to list the various elements of the fraud defense and allocates to the defendant the burden of proving those elements, but says nothing about the kind or quality or character of the evidence required to sustain that burden. This was the only point for charge submitted by the plaintiff, which dealt with the defense of fraud in the application. The Court of Appeal's determination that a new trial be granted because the trial judge failed to charge that the evidence required to prove fraud must be clear, precise and indubitable is a condonation of plaintiff's clear invitation of the alleged error. The trial court repeatedly emphasized that the burden of proof of the

fraud defense was upon the defendant. (8a supp., 9a supp., 29a supp., 26a. supp., 28a supp.) This was in accordance with plaintiff's fourth point for charge and the trial court must have assumed, justifiably, that it was charging on this issue in accordance with the wishes of the plaintiff. For the appellate court to convict the trial judge of error and upset the jury's verdict because the trial judge failed to adequately define the quality of proof required amounts to preventing a trial judge from relying on counsel to represent his client adequately in submitting points for charge.

The decision of the Court of Appeals places on the trial judge not only the duty to deliver a charge that is fair under the circumstances but the additional duty of making certain that each attorney adequately protects his client in the submission of points for charge. In the absence of an obvious miscarriage of justice which would clearly affect the fairness, integrity or public reputation of judicial proceedings, proper judicial administration prohibits appellate courts from reversing for unobjected to and inconsequential error in the charge. To hold otherwise casts doubt on every verdict, substantially increases litigation at the appellate and trial levels and makes of an appellate court a super jury, with the right to approve or disapprove each verdict, provided only that some error, even trivial, can be detected in the charge.

2. The Decision of the Court of Appeals Is in Conflict With Palmer v. Hoffman, 318 U.S. 109.

In the plaintiff's points for charge Request No. 4 (quoted *supra*) asked for an instruction that in substance stated that the defendant had the burden of proving the various elements in the defense of fraud in the application. Normally this request would be understood as meaning proof by a fair preponderance of the credible evidence, and the trial court apparently so understood the request and charged the jury accordingly. Under the Pennsylvania decisions cited by the Court of Appeals in its opinion a distinction is drawn between the fraud itself and other elements of the fraud defense, such as materiality of the misrepresentations, knowledge of their falsity and action in reliance thereon. Thus the opinion of the Pennsylvania Supreme Court in *New York Life Insurance Company v. Brandwene,* 316 Pa. 218, 172 Atl. 669 (1934), cited and relied upon by the Court of Appeals in its opinion, states (316 Pa. at 221): "The burden of proving the fraud is, of course, upon the party who alleges it [citing cases], and it must be established by clear and satisfactory evidence [citing cases]." However, the holding is in favor of the insurance company seeking rescission of the policy for fraud in the application, although there was no direct evidence of materiality, knowledge or reliance. Misrepresentations as to visits to doctors for other than trivial illnesses are declared material as a matter of law, and it is held that knowledge of the falsity of and action in reliance on the misrepresentations would be presumed in the absence of evidence to the contrary, so that no evidence thereof is required at all, let alone evidence that is clear, precise and indubitable. However, the plain-

tiff's Request No. 4 drew no distinction between those elements of the fraud defense, such as the making of the misrepresentations and their falsity, as to which the defendant's burden of proof must be carried by evidence that is clear, precise and indubitable, and those elements, such as materiality, knowledge of falsity and reliance, as to which proof by mere preponderance of the credible evidence is sufficient, and which even would be presumed in the absence of contrary evidence. Plaintiff's Request No. 4, interpreted as meaning that the defendant's burden of proof of the elements of the fraud defense was by the fair preponderance of the credible evidence, was correct as to some of those elements. If it was incorrect as to some other elements, *Palmer v. Hoffman,* 318 U.S. 109, holds that this does not justify granting a new trial.

Palmer v. Hoffman involved a personal injury claim where the charge of negligence was grounded alternatively under the common law and under a state statute. Under the common law the burden of disproving contributory negligence was on the plaintiff, while under the state statute the defendant had the burden of proving contributory negligence. This court refused to reverse and remand, because the defendant had requested a charge that the burden was on the plaintiff, without distinguishing between the common law and the statutory counts saying (318 U.S. 119-120):

> "Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have ob-

tained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial [citing cases]. That long standing rule of federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating."

In the case at bar the charge was correct with regard to the only element of the fraud defense which depended at all upon oral testimony to sustain it, that is action in reliance upon the misrepresentations. The facts as to the fraud were proved by documentary proof (the making of the misrepresentation by the application questions and answers, Ex. 4, 29a, and their falsity by the office records of Dr. Carnegie, Ex. I, 13b). This documentary proof was not only uncontradicted and unexplained, but also was stipulated by both parties to be authentic (Stipulation of Facts ¶21, 4b). As the court below has held (*Stopper v. Manhattan Life Ins. Co.*, 241 F.2d 465) under Pennsylvania law such evidence requires a jury to find for the insurer. The documentary nature of the proof of the only elements that had to be proved by clear and convincing evidence saved the charge from being erroneous at all, but if there was error it was invited by the failure of plaintiff's counsel, in his Request No. 4, to discriminate between those elements requiring such proof and those to be proved by a fair preponderance of the credible evidence. The court below might well have been persuaded of this had we had the opportunity to brief and

argue it, but the supposed error in the charge was never suggested until the opinion of the court below was handed down, and our petition for rehearing was refused.

3. The Decision of the Court of Appeals in Noticing Unobjected to Error in the Charge in the Absence of Exceptional Circumstances Frustrates the Policy Behind the Requirement in Rule 51 of the Federal Rules of Civil Procedure That a Party May Not Assign As Error an Objection to the Charge Which He Did Not Make Specifically Before the Jury Retired.

The policy considerations which led to promulgation of Rule 51 were to give finality to jury verdicts and judgments entered thereon, and to materially improve judicial administration. In *Stilwell v. Hertz Drivurself Stations, Inc.*, 174 F.2d 714, 715 (3d Cir. 1949), the court below stated the purpose of Rule 51 in the following language: "Rule 51 is designed to preclude counsel from assigning for error on appeal matter at trial which he did not fairly and timely call to the attention of the trial court."

The wisdom of this policy and its implementation in Rule 51 is readily apparent. However, nothing is gained by forclosing a party from unobjected to error in the charge as grounds for a new trial if an appellate court is free to notice the error and award a new trial *sua sponte* in circumstances that do not meet the stringent requirements laid down by this Court in the *Atkinson* case, *supra*. It is important to note that errors of law made by a trial court, in matters other than the charge, may be noticed by an appellate court with greater liberality without the same adverse affect on

orderly judicial administration because often such errors could not readily be obviated by bringing them to the attention of the trial judge. Such is the case with the kind of error of law that occurred in *Sibbach v. Wilson & Co.*, 312 U.S. 1. An error in an instruction to the jury, if it is brought to the attention of the trial court, can readily be obviated by correcting or adding to the charge. If objection at the time is not required, the courts are later faced with the choice of either allowing the verdict to stand, in spite of the error, in the interest of insuring orderly trial administration and the finality of verdicts and judgments entered thereon, or of subjecting the verdict winner to the risk of losing implicit in submitting his case to another jury, and the parties and the public to the expense and time entailed by a retrial.

Only in exceptional circumstances is there any justification for visiting the consequences of a new trial upon the public or upon a party innocent of any neglect to save the court from error or guilt in leading the court into error. Since Rule 51 provides counsel with every opportunity to insure a proper charge, an appellate court's power to award a new trial, based on unobjected to error in the charge, should be restricted to cases where the review is essential to prevent a gross miscarriage of justice. A less restrictive rule frustrates the policy considerations which led to Rule 51 and eliminates Rule 51 as an effective vehicle for the orderly administration of justice.

4. The Decision of the Court of Appeals Is in Conflict With the Decisions of Courts of Appeals in Other Circuits and With Other Decisions in Its Own Circuit.

In exercising the power, which this Court said in *Atkinson* resides in an appellate court, to notice unobjected to errors in the charge, such contrariety has developed in the circuits as to seriously prejudice the goal of uniformity throughout the federal court system in this important matter of judicial administration. The Court of Appeals for the Third Circuit has exercised less restraint than any other in using this power, and as a consequence has had many more cases than any other in which it has had to deal with the problem.

Initially the Court of Appeals for the Third Circuit required, as do many of the other Courts of Appeals, not only that the error be plain but also that it be necessary to notice it to avoid a gross miscarriage of justice: *Callwood v. Callwood,* 233 F.2d 784 (1956); *Reiner v. Bankers Security Corp.,* 305 F.2d 189 (1962). Subsequently, the Court relaxed the test to permit review of plain error which *may* have resulted in a miscarriage of justice: *Mazer v. Lipschutz,* 327 F.2d 42 (1964), cert. den. 385 U.S. 833. In the same year, however, the Court decided *Schabo v. County of Mercer, State of New Jersey,* 333 F.2d 971 (1964), where the Court refused to reverse for the reason that the unobjected to error was not so fundamentally unfair as to have in fact resulted in a gross miscarriage of justice. In this state of the authorities it would appear that the Court felt free to require a showing of miscarriage of justice either as a mere possibility or as an existing fact, depending upon considerations which were not articulated.

The case at bar, however, represents a relaxation even beyond the test as used in *Mazer*. Here the Court regarded itself as free to review what it claimed to be error in the charge without the necessity of finding even the possibility of a miscarriage of justice. The only test for review enunciated in the instant case is the same test as is applied in determining whether an error to which proper and seasonable objection *was* made is sufficiently prejudicial to call for a new trial. That this further relaxation of the rule was not a temporary aberration is shown by the very recent decision of *Ostrov v. Metropolitan Life Insurance Company*, decided June 27, 1967 and not yet officially reported, but reported unofficially in 7 CCH Life Cases 2d 753.

It was bad enough while the court below was vacillating between requiring a showing of a gross miscarriage of justice in fact and requiring a mere possibility of one, but its present rule seems a complete repudiation of the policy behind the requirement in Rule 51 of the Federal Rules of Civil Procedure of a specific objection before the jury retires.

The current rule in the Court of Appeals for the Third Circuit is in direct conflict with the rule in all of the other Courts of Appeals. The Court of Appeals for the Ninth Circuit considers Rule 51 as prohibiting review of unobjected to errors in the charge in a civil case: *Crespo v. Fireman's Fund Indemnity Co.*, 318 F.2d 174 (1963). The other Courts of Appeals will review unobjected to error in the charge where the error is plain and review must be had to prevent injustice: *Alexander v. Kramer Bros. Freight Lines, Inc.*, 273 F.2d 373 (2d Cir. 1959); *Willis v. Pa. R. Co.*, 269 F.2d 549

(4th Cir. 1959); *Curd v. Todd-Johnson Dry Docks, Inc.*, 213 F.2d 864 (5th Cir. 1954); *Chicago & N.W.Ry. Co. v. Green*, 164 F.2d 55 (8th Cir. 1947); *Allen v. Nelson Dodd Produce Co.*, 207 F.2d 296 (10th Cir. 1953); and *Shokuwan Shimabukuro v. Higeyoshi Nagayama*, 140 F.2d 13 (D.C. Cir. 1944), cert. den. 322 U.S. 755.

What this Court said in *Atkinson, supra*, has in practice proved to lack the necessary specificity to provide the Courts of Appeals with a standard that will assure uniformity. Also uncertainty has arisen over whether the limits on *sua sponte* review set in *Atkinson* are to be regarded as narrowed by the subsequent promulgation of Rule 51. It is necessary for this Court to reconsider the issue and give a new definition of those instances where unobjected to error should be considered on appeal, or the important question of how much finality should be accorded to a jury verdict will depend upon the accident of which circuit includes the district court in which the verdict was returned

5. The Award of a New Trial by the Court of Appeals Violates the Prohibition in the Seventh Amendment to the Constitution of the United States That no Court of the United States Shall Reexamine Facts Tried by a Jury Except According to the Rules of the Common Law.

The scope of the prohibition of the Seventh Amendment must be determined by resort to the appropriate rules of the common law as they existed at the time of the adoption of the amendment: *Baltimore & Carolina Line Inc. v. Redman,* 295 U.S. 654. At common law, appellate review was limited to questions of law and appellate courts had no jurisdiction to review or reexamine facts: *Parsons v. Bedford,* 28 U.S. 432.

The Seventh Amendment to the Constitution was adopted to preserve the integrity of the jury system and jury verdicts. Review in Courts of Appeals is limited to questions of law, and, particularly in a diversity case where state law must be applied, the mere statement by a court that an error of law occurred is not enough to make it so. As pointed out above, the claimed error in this case did not exist or, if it did, it was at most harmless. When the court below, in its opinion, first claimed that an error had been committed, counsel promptly filed a petition for rehearing requesting that it be permitted to submit a brief and oral argument to demonstrate to the court that no error existed. The petition for rehearing was denied. The Court of Appeals apparently reviewed the jury's findings and, for reasons it has not revealed, granted a new trial using an unobjected to error as a subterfuge to avoid the prohibition of the Seventh Amendment. This Court should not permit the Seventh Amendment to so lightly be brushed aside.

CONCLUSION

The petition for a writ of certiorari as prayed for should be granted to correct a decision that exceeds the limitations set out in *United States v. Atkinson,* 297 U.S. 157, that is contrary to the holding in *Palmer v. Hoffman,* 318 U.S. 109, that erodes the requirement of a specific objection to the charge in Rule 51 of the Federal Rules of Civil Procedure, that has brought the court below into conflict with the Courts of Appeals in the other circuits and has deprived the verdict winner in the District Court of its rights under the Seventh Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15936

ELINOR M. RATAY,

Appellant

v.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY

Appeal From the United States District Court for the Western District of Pennsylvania

Argued October 31, 1966

Before GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Opinion of the Court

(Filed May 16, 1967)

By SMITH, *Circuit Judge.*

This action was brought by the plaintiff to recover the proceeds of an interim insurance contract on the life of her husband and under which she was the beneficiary. The present appeal is from a judgment in favor of the defendant entered on the jury's answers to certain special interrogatories. The plaintiff seeks reversal of the judgment and remand of the action for either the entry of judgment in her favor or a new trial. We are persuaded by our review of the record

that the plaintiff is not entitled to the entry of judgment but she is entitled to a new trial.

On August 14, 1963, the plaintiff's husband made application to the defendant for term insurance on his life. He delivered to the agent Part One of an executed application and contemporaneously therewith his note in an amount equal to the first quarterly premium computed on the basis of a standard rate. He received a binding receipt on which the plaintiff's claim for damages is here predicated. On August 28, 1963, the applicant underwent a medical examination at which time he completed and delivered to the defendant's physician Part Two of the application. This part included the report of the medical examiner and the applicant's answers to questions relating to his prior medical history. While the application was pending and under consideration the applicant died on October 14 of a myocardial infarction resulting from arteriosclerosis. The application was declined on October 23, and in due course the plaintiff was notified.

The resolution of the first question for decision depends on the interpretation of the binding receipt, which reads in pertinent part as follows:

> "If a full first premium in accordance with the published rates of the Company . . . has been paid at the time of [the] appplication and declaration of such payment is made therein, the insurance, subject to the terms and conditions of the policy contract . . . in use by the Company *at this date, shall take effect on the date of Part One or Part Two of the application, whichever is later,* provided: . . . (2) the application, Part Two, is duly completed,

> . . . and (4) the Proposed Insured is on this date in good health; otherwise the payment evidenced hereby shall be returned upon demand and surrender of this receipt." (Emphasis added).

The effect of receipts similar to the one quoted has been widely litigated and with diverse results. See *Ransom v. The Penn Mutual Life Insurance Company,* 274 P. 2d 633, 635, 636 (Sup. Ct. Cal. 1954); *Simpson v. Prudential Insurance Company of America,* 177 A. 2d 417, 421-425 (Ct. App. Md. 1962).

The defendant does not deny the issuance of the binding receipt in exchange for the premium payment. However, it maintains that coverage thereunder was subject to a condition precedent, the good health of the applicant when his application was finally completed.[1] There are decisions in which it has been held, in accordance with defendant's view, that a proviso relating to the good health of the proposed insured at the time of his application is a condition precedent which must be met before coverage comes into existence. *Cliborn v. Lincoln National Life Insurance Co.,* 332 F. 2d 645 (10th Cir. 1964) and the cases therein cited. This is not the law of Pennsylvania.

Recently the Supreme Court of Pennsylvania, called upon to construe a receipt essentially the same as the one involved in the instant case, held that the proviso was a condition subsequent, reserving to the insurer a right to terminate coverage if it determined that the

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1. The court below adopted August 14 instead of August 28 as the critical date. The difference is of no relevant significance in our consideration of the issues before us.

insured was not in good health at the time of his application. *Steelnack v. Knights Life Insurance Co. of America,* 223 A. 2d 734, decided November 15, 1966. See generally *McAvoy Vitrified B. Co. v. North American L. Assur. Co.,* 149 A. 2d 42 (Sup. Ct. Pa. 1959).

In *Steelnack* the insurance company contested liability on the ground that coverage was not to become effective until after the proposed insured had submitted to a requested medical examination The Court in passing on this defense stated:

> "Nothing in the . . . language [of the receipt] indicates that the insurance coverage was to be delayed until the medical examination took place and the insured was found to be in good health. In fact, the opposite is implicit therein, namely, that the coverage began on the date of the binder subject to being terminated if the medical examination revealed the insured not in good health."

The Court went on to hold:

> "At best, the requested medical examination could only be a condition subsequent, which could terminate the insurance coverage in the event the company found the insured's health to be such that it could refuse to take him even as an accident risk."

The decision is in line with that of the Supreme Court of California in *Ransom v. The Penn Mutual Life Insurance Company, supra.* See also *Metropolitan Life Insurance Company v. Grant,* 268 F. 2d 307 (9th Cir. 1959).

The defendant also argues that the judgment of the court below is sustainable on the jury's affirmative answers to special interrogatories 3 and 4. It construes these answers in the light of the interrogatories as tantamount to a finding that coverage under the receipt was terminated prior to the death of the insured. This construction completely overlooks the unequivocally negative answer of the jury to special interrogatory 1, reading as follows:

> "Did the insurance company reject or decline Frank J. Ratay's application before his death on October 16, 1963?"

We are of the opinion that on the basis of the evidence in this case the answers to special interrogatories 1, 3 and 4 are consistant and therefore must be construed that way. *A. & G. Stevedores v. Ellerman Lines,* 369 U. S. 355, 364 (1962). Thus construed, the ground of the defendant's argument fails.

The defendant contested liability also on the ground that the decedent's answers to certain of the questions contained in Part Two of the application were false and fraudulent. The defendant now argues that the judgment of the lower court is supported by the jury's affirmative answer to a special interrogatory reading as follows:

> "Did Mr. Ratay make false statements, knowing them to be false, or otherwise act in bad faith in making them, when he answered questions 10, 12c, and 12h of Part II of the application?"

The argument would be acceptable as valid if the fraud issued had been submitted to the jury on a proper instruction but it was not.

The court correctly defined the elements of fraud but then instructed the jury that the burden was upon the defendant to prove each of the elements by a "fair preponderance of the credible evidence." This instruction was clearly erroneous. It is firmly established that under the law of Pennsylvania a party who alleges fraud, as either a defense or the basis of a claim, must prove the facts on which his allegation rests by evidence that is "clear, precise and indubitable." *Gerfin v. Colonial Smelting & Refining Co.*, 97 A. 2d 71, 72 (1953); *Highmont Music Corp. v. J. M. Hoffman Co.*, 155 A. 2d 363, 366 (1959). The evidence must be so cogent "as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts" alleged. *Gerfin v. Colonial Smelting & Refining Co., supra,* 74. The standard of proof is equally as exacting where, as here, fraud is raised as a defense to an action on a policy of insurance. *New York Life Ins. Co. v. Brandwene,* 172 Atl. 669, 670 (1934); *Campdon v. Continental Assur. Co.*, 157 Atl. 464, 466 (1931); *Suravitz v. Prudential Ins. Co. of America,* 104 Atl. 754, 756 (1918); *Equitable Life Assur., Etc. v. Dunn,* 61 F. 2d 450, 452 (3rd Cir. 1932).

The record indicates that the plaintiff made no specific objection to the charge as given but was apparently content to rest on a general exception granted by the trial judge.[2] This inaction would ordinarily preclude our consideration of the error on this appeal.

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2. This practice, frequently followed by some lawyers, and at times encouraged by some judges, fails to comply with the rule. The practice should be discontinued and the judges should insist on strict compliance with the rule.

FEDERAL RULES CIV. PROC., RULE 51, 28 U.S.C.A.; *McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 102 (3rd Cir. 1960); *Callwood v. Callwood*, 233 F. 2d 784, 788 (3rd Cir. 1956). It remains for us to consider whether the error in the instruction was so fundamental and highly prejudicial as to justify our review of it despite the absence of a proper objection. *Ibid.* We think it was. The erroneous instruction related to a critical issue and cannot be regarded as harmless unless it affirmatively appears from the whole record that it was not prejudicial to the substantial rights of the plaintiff. *McCandless v. United States*, 298 U.S. 342, 347, 348 (1936); *United States v. McNally Pittsburg Manufacturing Corp.*, 342 F. 2d 198, 202 (10th Cir. 1965); *Sears v. Southern Pacific Company*, 313 F. 2d 498, 503 (9th Cir. 1963). It does not so appear in the instant case.

The judgment of the court below will be reversed and the action will be remanded with a direction that a new trial be ordered.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION FILE NO. 64-39

ELINOR M. RATAY
v.
THE LINCOLN NATIONAL LIFE INSURANCE COMPANY

Judgment

This action came on for trial before the Court and a jury, Honorable Edward Dumbauld , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, upon special interrogatories,

It is Ordered and Adjudged that judgment be entered in favor of the Defendant, THE LINCOLN NATIONAL LIFE INSURANCE COMPANY and against the Plaintiff, ELINOR M. RATAY, together with costs.

Judgment is hereby entered in accordance with the above verdict.

Dated at Pittsburgh, Pennsylvania , this 9th day of December, 1965.

s/ JAMES H. WALLACE, JR.
Clerk of Court

APPROVED: DUMBAULD
United States District Judge

Order of Court

AND NOW, this 14th day of April, 1966, upon consideration of plaintiff's motion for judgment non obstante veredicto or new trial, after argument, and the Court being of opinion that the issues were adequately submitted to the jury, and of the sort traditionally suitable for jury determination, and were decided by the jury with adequate support in the evidence; and the Court being of opinion that Finding No. 8 (establishing that the insured made false statements, knowing them to be false, or otherwise acted in bad faith in making them, when he answered questions 10, 12c, and 12h of Part II of the application), in conjunction with Findings 9(a) and 9(b) showing reliance by defendant, precludes judgment for the plaintiff;

It is ordered that plaintiff's said motion be and the same is hereby denied, and the judgment entered on the verdict on behalf of defendant shall stand.

(s) Dumbauld,
United States District Judge.

Jury Special Findings

8. Did Mr. Ratay make false statements, knowing them to be false, or otherwise act in bad faith in making them, when he answered questions 10, 12c, and 12h of Part II of the application?

Answer: Yes.

9(a). Did the Company on September 5, 1963 fail to send for the electrocardiogram of July 15, 1963, by reason of reliance on Ratay's answer to question 12h of Part II of the application?

Answer: Yes.

9(b). If the electrocardiogram of July 15, 1963, had been forwarded, would the Company have declined Ratay's application on September 30, 1963?

Answer: Yes.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,936

ELINOR M. RATAY,

Appellant

v.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY

(D. C. Civil No. 64-039)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY, SMITH *and* FREEDMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 9, 1965, be, and the same is hereby reversed, with costs, and the cause is remanded with a direction that a new trial be ordered.

ATTEST:
THOMAS F. QUINN
Clerk

May 16, 1967

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,936

ELINOR M. RATAY,

Appellant

v.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,

Appellee

Sur Petition for Rehearing

Present: STALEY, *Chief Judge*, MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH, FREEDMAN and SEITZ, *Circuit Judges.*
Circuit Judges.

The petition for rehearing filed by THE LINCOLN NATIONAL LIFE INSURANCE COMPANY in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WILLIAM F. SMITH
Judge

Dated: June 15, 1967